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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRYCE EDWARD SAWIN, Plaintiff and Appellant, v. CITY OF ANAHEIM, Defendant and Respondent.	G040432 (Super. Ct. No. 07CC05846) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Bryce Edward Sawin, in pro. per., for Plaintiff and Appellant.

Jack L. White, City Attorney, and Jorge A. Solis, Deputy City Attorney, for Defendant and Respondent.

* * *

Plaintiff Bryce Edward Sawin sued defendant City of Anaheim (Anaheim) after Anaheim police officers ordered Sawin's car towed and impounded, and took Sawin into custody for trespassing after Sawin retrieved personal items from the car without the tow company's permission. The trial court granted Anaheim's demurrers to Sawin's second amended complaint, with 10 days leave to amend as to two causes of action. Sawin, however, did not amend within the time provided and instead dismissed Anaheim from the action without prejudice. The trial court later denied Sawin's application for an extension in the time to amend, and granted Anaheim's motion to dismiss with prejudice.

Sawin contends the trial court abused its discretion in not granting him more time to amend, and lacked jurisdiction to dismiss Anaheim from the action with prejudice because the clerk had already dismissed Anaheim without prejudice. We disagree with these contentions.

The only evidence Sawin placed before the trial court to support his application for an extension of time was that the trial court's minute order from the demurrer hearing was unavailable for copying until after the 10-day time period had elapsed. But Sawin was present at the hearing when the trial court issued its ruling, and Anaheim served a notice of ruling by mail the same day reflecting the trial court's ruling. Moreover, Sawin's assertion on appeal that he is hard of hearing and was unable to hear the trial court's ruling is unsupported by evidence, and fails to explain why Sawin did not prepare an amended complaint before the hearing on his application, over a month after the trial court sustained the demurrers.

Sawin's contention the trial court lacked jurisdiction to grant Anaheim's motion because he already had voluntarily dismissed is without merit based on California Supreme Court precedent. In *Wells v. Marina City Properties, Inc*. (1981) 29 Cal.3d 781 (*Wells*), the court held that a plaintiff who fails to amend within the time provided after a trial court sustains demurrers with leave to amend loses the right to unilaterally dismiss

without prejudice. Accordingly, we affirm the judgment dismissing Anaheim from the action with prejudice.[1]

I

FACTUAL AND PROCEDURAL BACKGROUND

Upon the order of an Anaheim police officer, a towing company removed and impounded Sawin's automobile. Although the vehicle did not have an operating permit because the car required work on its emissions system, Sawin had paid registration fees and the car was parked legally. Because Sawin had been living in his car, he was forced to sleep outside after the vehicle was impounded.

When confronted by Sawin, the Anaheim police confirmed one of their officers had ordered the vehicle towed, but was unable to give a reason for this action, and informed him a hold had not been placed against the vehicle. Sawin contacted the towing company, which confirmed his car was in its impound lot and informed him it would not release the vehicle until Sawin paid a towing charge of $180. Sawin arrived at the impound lot to pick up his personal items, which included his clothes and some Navy documents. But the tow company dispatcher at the lot informed him he could not obtain the articles unless he first paid a $45 fee.

Believing the vehicle and personal items had been wrongfully seized and held, Sawin scaled a chain link fence at the impound lot and retrieved certain personal items. After Sawin left the impound lot, a tow truck driver stopped him, and police took him into custody for trespassing on the tow yard based on the citizen's arrest by the tow company's dispatcher.

Sawin sued Anaheim and the tow company. In his second amended complaint, Sawin alleged causes of action for (1) violation of the California Due Process

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[1] Sawin filed a motion for production of additional evidence on appeal. The additional evidence cited in the motion does not concern the matters raised in this appeal. Accordingly, we deny the motion.

Clause, (2) conversion, (3) false arrest/false imprisonment, and (4) emotional distress. At a hearing on March 18, 2008, with Sawin present, the trial court sustained Anaheim's demurrer on the first two causes of action with leave to amend, and the third and fourth causes of action without leave to amend. The court gave Sawin 10 days to amend the first and second causes of action. Anaheim prepared a notice of ruling and served Sawin by mail on the same day of the hearing. Although Sawin was required to file an amended pleading by March 28, 2008, he did not do so. On April 17, 2008, Sawin voluntarily dismissed Anaheim without prejudice.

On April 24, 2008, Sawin applied ex parte to extend the time period in which to amend. In the application, Sawin declared the minute order from the demurrer ruling was not available from the court until after the 10-day period had run. The trial court denied Sawin's application. On May 6, 2008, Anaheim filed an ex parte application for an order dismissing Sawin's complaint with prejudice under Code of Civil Procedure[2] section 581, subdivision (f)(2).[3] On May 7, 2008, the court granted Anaheim's application and dismissed Anaheim from the action with prejudice. Sawin now appeals.

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[2] All statutory references are to the Code of Civil Procedure.

[3] Section 581, subdivision (f), provides, in relevant part: "The court may dismiss the complaint as to that defendant when: [¶] . . . [¶] (2) [A]fter a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal."

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Sawin's Application for an Extension of Time to File an Amended Pleading and Dismissing Anaheim from the Case with Prejudice*

"A trial court's determinations to deny leave to file a belated amended pleading under section 473, subdivision (a)(1)[4] [citation], . . . [citation], and to dismiss an action under section 581, subdivision (f)(2) [citation] are all reviewed for abuse of discretion. The burden is on plaintiffs to establish such abuse." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

Sawin asserts the trial court should have excused his failure to timely amend because the court had not placed the court's March 18 minute order in a computer image, calling for amendment within 10 days, until sometime during the first week of April. Because the order was unavailable until after the 10-day period had run, Sawin asserts he could not comply with it. Sawin admits he was present when the court issued its ruling, but represents he is "very hard of hearing and currently requires medical need to irrigate his ears," and was therefore unable to hear the court's ruling. Sawin further asserts he relied on the fact the court previously had granted him 20 days leave to amend.

There are several problems with Sawin's argument. First, most of it is unsupported by any evidence. Significantly, Sawin's ex parte application for an extension said noting about his alleged hearing difficulties. Instead, the application stated

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[4] Section 473, subdivision (a)(1), provides: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."

simply: "The court minutes were not imaged and available until past the 10 days order[e]d." Because Sawin did not include a reporter's transcript in the record on appeal, the application is our sole source of the evidence and argument before the trial court.

Assuming for the moment Sawin's alleged hearing problems prevented him from hearing clearly the trial court's ruling, the record includes a proof of service, attesting Anaheim served Sawin a notice of ruling by mail on March 18, the same day as the hearing. The address for Sawin on the proof of service matches the address given by Sawin in his court filings. The notice of ruling states the court sustained demurrers to the first and second causes of action "with 10 days leave to amend." Sawin does not assert he did not receive the notice of ruling, nor does he explain why the notice did not timely and adequately inform him of the trial court's ruling.

In addition, Sawin's contention he relied on the court's previous practice of granting 20 days leave to amend is unavailing. The 20th day after the hearing was April 7; but Sawin did not attempt to file a third amended complaint on that day, and did not include a copy of his proposed pleading when he sought ex parte relief on April 24. Sawin proffers no excuse for failing to lodge with the court a proposed third amended complaint at the ex parte hearing, despite having over a month to prepare it. In sum, we have little trouble concluding the trial court did not abuse its discretion in denying a further extension of time for amendment, and dismissing Anaheim from the case with prejudice.

B. *Because Sawin Failed to Timely Amend His Complaint After the Trial Court Sustained Anaheim's Demurrers, He Could Not Dismiss the Case Without Prejudice Under Section 581, Subdivision (B)(1)*

Section 581, subdivision (b)(1), provides: "An action may be dismissed in any of the following instances: [¶] With or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if

any." Sawin contends the trial court erred in dismissing Anaheim from the case with prejudice under section 581, subdivision (f)(2), because Sawin already had dismissed Anaheim from the case without prejudice, thus depriving the trial court of jurisdiction.

This contention is squarely refuted by the California Supreme Court in *Wells, supra,* 29 Cal.3d 781. There, the trial court sustained demurrers to the plaintiff's complaint with 30 days leave to amend. After plaintiff failed to amend within the time provided, the defendant moved for dismissal with prejudice. While the defendant's dismissal motion was pending, the plaintiff filed a request for dismissal without prejudice. The trial court granted defendant's motion to dismiss with prejudice, but later reversed itself when it discovered the plaintiff's dismissal had been entered before the court granted the defendants' motion. The Supreme Court reversed the trial court's order with instructions to reinstate its previous judgment of dismissal with prejudice, concluding "that once a general demurrer is sustained with leave to amend and plaintiff does not so amend within the time authorized by the court or otherwise extended by stipulation or appropriate order, he can no longer voluntarily dismiss his action pursuant to section 581, subdivision [(b)(1)], even if the trial court has yet to enter a judgment of dismissal on the sustained demurrer." (*Well*s, at p. 789.)

Sawin attempts to distinguish the present situation from that in *Wells,* noting that he had obtained dismissal without prejudice *before* Anaheim filed its motion to dismiss. This is a distinction without a difference. The Supreme Court in *Wells* did not base its ruling on the order in which the plaintiff and defendant sought dismissal, but on its conclusion that a plaintiff may not dismiss an action without prejudice as of right once a demurrer has been sustained with leave to amend and the plaintiff does not amend within the time provided. Because Sawin did not timely amend after Anaheim's demurrers were sustained, Sawin's voluntary dismissal without prejudice was ineffectual.

C. *The Trial Court Did Not Err in Dismissing Sawin's Fourth Cause of Action with Prejudice*

Sawin's fourth cause of action concerns treatment he received on a shoulder strain that required him to stay one night at a hospital. Sawin concedes this is a potential action against the hospital and does not involve Anaheim. He nonetheless requests we grant declaratory relief requiring the superior court to allow him to refile the claim under the false claims act. Sawin includes no argument or authority on this point. We therefore do not consider it further. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration'"].)

III

DISPOSITION

The judgment is affirmed. In the interests of justice, each side is to bear its own costs of this appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.